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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1221

OSWALD AND HESS COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals appears at pages 184 to 188 of the Record. It has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1945 (R. 189). The petition for a writ of certiorari was filed April 28, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as

amended, c. 26, 56 Stat. 23 (herein sometimes referred to as "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether petitioner established that the maximum prices for beef carcasses and wholesale cuts under Revised Maximum Price Regulation No. 169 are not valid under the standards of the Emergency Price Control Act, as amended.

(2) Whether the Regulation is unlawfully discriminatory because it establishes a higher price for fabricated beef cuts when sold by hotel supply houses than when sold by slaughterers.

(3) Whether the court below correctly held that it lacked jurisdiction to review the validity of a provision of Revised Maximum Price Regulation No. 169 which had been promulgated by the Price Administrator, not under the Emergency Price Control Act, but under authority conferred by the Second War Powers Act and delegated to him.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended, of the Second War Powers Act, and of Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts (7 F. R. 10381; 8 F. R. 7109, 10362, 11081; 9 F. R. 1121, 4648) are set forth in the Appendix, *infra*.

STATEMENT

Petitioner slaughters livestock, including cattle, and sells fresh meat, including beef carcasses and wholesale cuts, and also manufactures and sells sausage (R. 2). As a seller of beef, petitioner is subject to the provisions of Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, which was issued December 10, 1943, fixing maximum prices for beef. On August 20, 1942, petitioner filed a protest with the Price Administrator against the predecessor regulation, Maximum Price Regulation No. 169 (7 F. R. 4653); the protest was concerned primarily with the effect of the regulation upon petitioner's sausage business (R. 2–7). After the introduction of additional evidence (R. 15–42), the protest was denied by the Administrator on May 4, 1943 (R. 43–50).

On May 24, 1943, petitioner filed its complaint in the Emergency Court of Appeals (R. 152). On November 3, 1943, that court granted petitioner's application to present additional evidence to the Price Administrator (R. 93). Petitioner's additional evidence emphasized its inability to recover costs on beef, and the allegedly excessive margin allowed to hotel supply houses (R. 96–100). After the Administrator incorporated certain material into the record (R. 107) and petitioner submitted rebuttal evidence (R. 111), the protest was denied by the Administrator upon reconsideration

(R. 115–131) and a supplemental transcript of the proceedings before him was filed with the Emergency Court of Appeals on August 15, 1944 (R. 91). The court sustained the denial of the protest and dismissed the complaint (R. 184–189).

ARGUMENT

1. Petitioner's first contention is that the Regulation fails to comply with the standards of the Act because it does not provide a profit on petitioner's sales of beef. The court below dismissed the complaint because petitioner had failed to establish either that the meat packing industry as a whole was not earning profits on over-all operations equal to those earned during representative peacetime years or that the industry generally was not able to recover out-of-pocket costs on cattle operations (R. 185). In so holding, the court applied, to the special circumstances of the meat packing industry, standards which it had previously held to satisfy the basic statutory requirement that maximum prices established by the Administrator must be "generally fair and equitable." *Gillespie-Rogers-Pyatt Co. et al.* v. *Bowles,* 144 F. (2d) 361 (E. C. A. 1944); *Armour and Company* v. *Bowles,* (E. C. A.), decided March 29, 1945, pending on petition for certiorari, No. 1220, present Term. Those standards had been fully explained by the Administrator to the Congress during the course

of hearings on the extension of the Act.[1] In extending the effective date of the Act, without making any change in the basic standard,[2] the Congress indicated its acceptance and approval of the Administrator's interpretation of that standard. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345.

Petitioner's own situation confirmed the Administrator's conclusion as to the profitable condition of the industry generally and the unreasonableness of attempting to assure a profit on each commodity produced by a multiple-product industry. Despite alleged losses on beef, petitioner's profits before taxes in 1943 were more than

[1] See Senate Banking and Currency Committee, Report on S. 1764, Report No. 922, 78th Cong., 2d Sess., views of the minority, p. 25, supplemental statement, pp. 45–47. See also testimony by Mr. Brownlee, Deputy Administrator for Price: House Hearings on H. R. 4376, 78th Cong., 2d Sess. (1944) (hereafter referred to as House Hearings), Vol. 1, pp. 55, 62; Senate Hearings on S. 1764, 78th Cong., 2d Sess. (1944) (hereafter referred to as Senate Hearings), pp. 77–78, 91–96); written statements by the Administrator: Senate Hearings, p. 1444–5, House Hearings, pp. 2128–2130; Memorandum on Certain Questions of Construction of the Emergency Price Control Act relating to Standards for Maximum Prices, Senate Hearings, pp. 1404–1412, House Hearings, Vol. 2, pp. 1984–1993; Memorandum on Certain Questions of Construction of the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942, House Hearings, Vol. 2, pp. 1993, 1996–1999; Senate Hearings, pp. 1422, 1425–1428.

[2] Stabilization Extension Act of 1944, c. 325, 58 Stat. 643.

150% of its average profits in the three years immediately preceding price control (R. 127; 35, 37, 39, 106). Moreover, petitioner had stated in its original protest that:

> it has always been necessary for the protestant to sell its fresh beef at a loss, which loss was always recovered by the sale of sausage products to its customers (R. 4).

Thus, petitioner undermined its own contention that it was entitled under price control to a profit margin on sales of beef.

2. Petitioner urges that the Regulation discriminates unlawfully against slaughterers by providing an excessively high mark-up for the sale of fabricated beef cuts to purveyors of meals by non-slaughtering hotel supply houses. But petitioner admitted that fabricated cuts cost more to process than ordinary wholesale cuts (R. 97), and, as the court below observed (R. 187), failed to present evidence showing that the differentials finally established were excessive. Section 2 (c) of the Act authorizes the Administrator to make necessary "classifications and differentiations." Petitioner failed to make any substantial showing that the differential in the maximum prices for fabricated cuts was unreasonable.

3. Section 1364.415 of the Regulation established quota restrictions on the sale of fabricated cuts to purveyors of meals. Briefly, it prohibited any seller from selling in the form of fabricated

cuts in any quarterly period more than 70% of the total weight volume of meats that the same seller had sold to purveyors of meals in the three months ended December 15, 1942. Subsection (d) of Section 1364.415 expressly recited that the section was issued under the authority to ration meat which had been vested in the Administrator by delegation of powers contained in Title III of the Second War Powers Act, 56 Stat. 176. By sections 204 (a) and 203 (a) of the Emergency Price Control Act, the jurisdiction of the Emergency Court of Appeals is limited to review of regulations or orders issued under section 2 of that Act. The court below was clearly right in concluding that it had no jurisdiction to review an order issued under wholly different authority merely because, for the convenience of those subject to it, it had been set forth as part of a maximum price regulation.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted,

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RICHARD H. FIELD,
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Office of Price Administration.

MAY 1945.

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